

Neutral Citation Number: [2021] EWCA Crim 600

Case No: 202100554 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM the Crown Court at Stoke on Trent
Recorder Julian Taylor
T20190044

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2021

Before :

PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE JEREMY BAKER
and
MR JUSTICE HENSHAW

APPLICATION BY PROSECUTION FOR LEAVE TO APPEAL UNDER
Section 58 CRIMINAL JUSTICE ACT 2003
(MS)

Mr M Duck Q.C. (instructed by **West Midlands CPS**) for the **Applicant**
Mr B Williams (assigned by the **Registrar of Criminal Appeals**) for **MS**

Hearing dates: 15 April 2021

Approved Judgment

<p>If this Judgment has been emailed to you it is to be treated as ‘read-only’. You should send any suggested amendments as a separate Word document.</p>

Lord Justice Fulford VP:

Introduction

1. This is an application by the prosecution for leave to appeal under section 58 Criminal Justice Act 2003. The provisions of section 71 of the Criminal Justice Act 2003 apply to these proceedings. By virtue of those provisions, no publication may include a report of the present hearing or this judgment until the conclusion of the trial or the proceedings are otherwise brought to a conclusion, unless the Court orders that the provisions are not to apply. However, this anonymised judgment may be published.
2. The provisions of section 45 Youth Justice and Criminal Evidence Act 1999 are engaged in this case because the child of the respondent, SS, is aged 15 (she was born in May 2005). We make an order preventing any information being included in a publication which is likely to lead members of the public to identify her as someone concerned in these proceedings. The order will cease to have effect when she attains the age of 18. There is no restriction on the publication of this judgment.
3. On 23 April 2019, in the Crown Court in Stoke on Trent (Judge Fletcher), the defendant, who is the respondent to this application (MS) pleaded guilty to forgery (count 1), contrary to section 1 Forgery and Counterfeiting Act 1981.
4. On 18 February 2021, in the Crown Court in Stoke on Trent (Recorder Julian Taylor), the trial of MS commenced, in respect of an offence of attempted child abduction (count 2), contrary to section 1(1) Criminal Attempts Act 1981 and section 1 Child Abduction Act 1984.
5. On 19 February 2021, at the close of the prosecution case, the judge acceded to the defence submission of no case to answer.
6. On 22 February 2021, the prosecution indicated an intention to appeal and gave the necessary acquittal undertaking. The judge refused an application by the Crown for leave to appeal or an order of expedition.
7. The Registrar has referred the prosecution's application for leave to appeal under section 58 Criminal Justice Act 2003 against the ruling of Mr Recorder Taylor to the full court. The appeal notice was served in time, but the applicant was late in furnishing the relevant transcripts. No point is taken on this failure to comply with the rules.

The Facts

8. The respondent had three children – SR (born in October 2000), SS (referred to above) and SA (born in November 2014). SS lived with her mother, the respondent MS, who was separated from her father (AC), following an acrimonious breakup. In 2013, AC obtained a Contact Order from the Family Court giving him the right to see SS overnight at least twice a week.
9. In 2017, the respondent MS, having started a new relationship with a man who is a national of a north African country, asked AC if he would permit her to take SS (then aged 12) to live abroad. He refused. On 22 November 2017, the Family Court issued a Prohibited Steps Order refusing to allow the respondent to take SS out of the jurisdiction. A further Court hearing was listed for 24 November 2017.
10. However, MS had already started to make plans to leave the country. She forged AC's signature on a form entitled "*Permission to Take A Child Abroad*" dated 22 November 2017 and she had searched online as to how long a Prohibited Steps Order would remain

in force once the child had been taken out of the country. She originally booked a ferry from Dover to Calais for 24 November 2017, but informed a friend she had managed to bring this forward to 23 November 2017.

11. On 23 November 2017, the respondent and her boyfriend packed all their belongings and the children into their car and drove towards Dover. She informed SS's school that she would be absent as they were viewing houses. She told a friend that she was going to miss her and England, and a little later sent a message to say they had left and were running late.
12. The social worker who had involvement with the family tried unsuccessfully to contact the respondent on 23 November 2017. When she attended the home address, she realised that the family had left and she contacted the police. The respondent's vehicle was stopped just after 2pm at Cobham Services, in the vicinity of junctions 9 and 10 on the M25. The police took possession of five United Kingdom passports and one expired passport from the north African country of which the respondent's new partner was a national, along with documents regarding the ferry booking and hotel bookings in France.
13. In interview, the respondent denied intending to leave the jurisdiction. She stated that when the court refused her permission to leave with SS, she had decided to travel to the home of a relative in Southampton.
14. The narrative set out above was essentially undisputed at trial.

The Judge's Ruling

15. The judge ruled that the offence had not been made out in law. There was, accordingly, no case to answer and the case should be withdrawn from the jury.
16. The respondent had accepted that she had clearly taken a number of preparatory acts in connection with taking her children out of the jurisdiction, but the critical question was whether those acts were "*more than merely preparatory*". The judge was referred to some of the relevant jurisprudence, to which we will turn in our analysis of the merits of this application. He concluded that as the respondent had been stopped some 85 miles from the port of Dover, her acts were no more than merely preparatory. There was, in his judgment, no case to answer and the jury were directed to return a not guilty verdict.

The Submissions on the Appeal

17. Mr Duck Q.C., on behalf of the applicant, relies on the respondent's guilty plea to the forgery of the "*Permission to Take Child Abroad*" form which would have been required at the border as part of her attempt to leave the country with her children. It is submitted that the commission of the offence in count 1 demonstrated significant planning and deception on her part. Furthermore, her internet searches on 22 November 2017 indicated that the respondent was contemplating defying the Prohibited Steps Order very shortly after it had been imposed and she immediately made plans to expedite her departure to north Africa, most likely sailing from Civitavecchia on the Italian coast. On 23 November 2017, whilst organising the family's departure, she informed a friend that she had left and would miss her and England. She made the necessary onward travel arrangements through Europe, including booking two hotels in France, and they had passed the junction on the M25 that would have taken her to Southampton (the M3

motorway), which she claimed was her intended destination. There was a late change at 9.27am 23 November 2017 to the time of the sailing (10.15am to 4.40pm). On this basis the Crown submits the acts taken were more than merely preparatory. The offence had required substantial organisation, and the respondent admitted having put everything necessary in place. The offence was foiled only by the timely reaction of Social Services and the police.

18. It was additionally suggested in writing by Mr Duck that attempted abduction is a continuing offence, which had begun when the respondent left the family home with the child intending to leave the jurisdiction. However, in argument Mr Duck agreed that the simple question that we are asked to address on this application is whether on all the facts of the case the respondent had taken steps that were, *prima facie*, more than merely preparatory and whether it was open to the jury to convict her of attempting to commit the offence of parental abduction.
19. Mr Williams, on behalf of the respondent, supports the ruling of the judge. It is suggested that there was insufficient evidence that she had properly embarked upon this crime or had tried to commit the offence. It is submitted that at the point of arrest she was at too far a remove from committing the crime, that is, removing the children from the jurisdiction by leaving the country. Mr Williams placed considerable emphasis on the ingredient of “*geographical proximity*” and suggested that the respondent needed to have been at the ferry port, attempting to board the ferry for her actions to have become more than merely preparatory. When she was stopped on the M25, the respondent was not yet, Mr Williams submitted, in a position where she was able to commit the offence.

Discussion

20. Section 1 Criminal Attempts Act 1981, as relevant, is in the following terms:

Attempting to commit an offence.

(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

[...]

21. Child abduction by a parent (or similar person such as a guardian) occurs when a person connected with a child under the age of 16 takes or sends a child out of the United Kingdom without the appropriate consent (Section 1(1) Child Abduction Act 1984).
22. The *locus classicus* on the interpretation of section 1(1) Criminal Attempts Act 1981 was provided by Lord Lane CJ in *R v Ian John Gullefer* (1990) 91 Cr App R 356, 358 and 359; [1990] 1 WLR 1063, 1066:

“It seems to us that the words of the Act of 1981 seek to steer a midway course. They do not provide [...] (that) the defendant must have reached a point from which it was impossible for him to retreat before the actus reus of an attempt is proved. On the other hand the words give perhaps as clear a guidance as is possible in the circumstances on the point of time at which [...] (the) “series of acts” begin. **It begins when the merely preparatory acts come to an end**”

and the defendant embarks upon the crime proper. When that is will depend of course upon the facts in any particular case.” (our emphasis)

23. The facts in *Gullefer*, as taken from the judgment, were that on 5 March 1985, the appellant attended the Greyhound Racing Stadium at Romford. During the last race, as the dogs rounded the final bend, he climbed the fence on to the track in front of the dogs, waving his arms and attempting to distract them. His efforts were only marginally successful, and the stewards decided that it was unnecessary to declare “no race.” Had they made such a declaration, by the rules the bookmakers would have been obliged to repay the amount of his stake to any punter, but would not have been liable to pay any winnings to those punters who would have been successful if the race had been valid. The court concluded (at page 358):

“Our view is that it could not properly be said that at that stage he was in the process of committing theft. What he was doing was jumping on to the track in an effort to distract the dogs, which in its turn, he hoped, would have the effect of forcing the stewards to declare “no race,” which would in its turn give him the opportunity to go back to the bookmaker and demand the £18 he had staked. In our view there was insufficient evidence for it to be said that he had, when he jumped on to the track, gone beyond mere preparation.”

24. Lord Lane’s approach was followed, *inter alia*, in *R v Campbell* (1991) 93 Cr App R 350. In that case the appellant was convicted of attempted robbery and pleaded guilty to possessing an imitation firearm. As usefully summarised in the headnote, police officers, having received information that a robbery might be made on a sub post office, kept watch. The appellant was seen to be lurking in the vicinity, having arrived there on a motor cycle wearing a crash helmet. He then was seen walking around and wearing sunglasses and seemed to be carrying some heavy object. He stopped some 30 yards from the post office, took off his glasses and looked round. He then walked away and 30 minutes later returned and was arrested in front of the post office. On being searched, the sunglasses, an imitation gun and a threatening note were found upon him. He admitted his actions, said that the note was meant to frighten the person behind the counter at the post office; but maintained that he had then decided not to rob the post office and was arrested before he could return to his motor cycle and drive off. As Watkins LJ observed at page 355:

“He was not, as he had done previously that day, wearing, as a form of disguise, sunglasses. It was not suggested that he had, in the course of making his way down the road past the post-box, turned and, so to speak, moved towards the door of the post office so as to indicate that he intended to enter that place.”

[...]

“A number of acts remained undone and the series of acts which he had already performed—namely, making his way from his home or other place where he commenced to ride his motor cycle on a journey to a place near a post office, dismounting from the cycle and walking towards the post office door—were clearly acts which were, in the judgment of this court, indicative of mere preparation, even if he was still of a mind to rob the post office, of the commission that is of the offence of robbery.”

25. In *Attorney-General's Reference (No.1 of 1992)* (1993) 96 Cr App R 298, in a case of attempted rape, Lord Taylor CJ observed at page 302:

“It is not, in our judgment, necessary, in order to raise a prima facie case of attempted rape, to prove that the defendant with the requisite intent had necessarily gone as far as to attempt physical penetration of the vagina. It is sufficient if there is evidence from which the intent can be inferred and there are proved acts which a jury could properly regard as more than merely preparatory to the commission of the offence. For example, and merely as an example, in the present case the evidence of the young woman's distress, of the state of her clothing, and the position in which she was seen, together with the respondent's acts of dragging her up the steps, lowering his trousers and interfering with her private parts, and his answers to the police, left it open to a jury to conclude that the respondent had the necessary intent and had done acts which were more than merely preparatory. **In short that he had embarked on committing the offence itself.**” (our emphasis)

26. A notable further elaboration of the approach to be adopted was provided in *R v Geddes* (1996) Crim LR 894-896 by a court presided over by Lord Bingham CJ. The facts were that the appellant was convicted of attempted false imprisonment. He had been seen by a teacher in the boys' lavatory block of a school. He had no connection with the school and no right to be there. He had a rucksack with him. A woman police officer who was, by chance, on the premises saw him and shouted at him. He made good his escape. A cider can which had belonged to the appellant was found in a cubicle in the lavatory block. His rucksack was later discovered in bushes. It contained a large kitchen knife, some lengths of rope and a roll of masking tape. The appellant was arrested. The prosecution alleged that the presence of the cider can showed that the appellant had been inside a lavatory cubicle, and that the contents of the rucksack could have been used to catch and restrain a boy entering the lavatory.

27. As to the approach in principle to be taken, the judgment set out the following:

“[...] the authorities showed that the line of demarcation between acts which were merely preparatory and acts which might amount to an attempt was not always clear or easy to recognise. There was no rule of thumb test, and there must always be an exercise of judgment based on the particular facts of the case. It was an accurate paraphrase of the statutory test to ask whether the available evidence, if accepted, could show that a defendant had done an act showed that he had actually tried to commit the offence in question, or whether he had only got ready or put himself in a position or equipped himself to do so.

28. On the facts, the court decided:

“In the present case there was not much room for doubt about the appellant's intention, and the evidence was clearly capable of showing that he had made preparations, had equipped himself, had got ready, had put himself in a position to commit the offence charged. It was true that he had entered the school, but he had never had any contact or communication with, nor had confronted, any pupil at the school. The whole story was one which filled the court with the gravest unease, but on the facts of the case the court felt bound to conclude that the evidence was not sufficient in law to support a finding that the appellant had done

an act which was more than merely preparatory to wrongfully imprisoning a person unknown.”

29. In *Moore v DPP* [2010] EWHC 1822 (Admin); [2010] R.T.R. 36, the facts, summarised in the headnote (H4) were:

“The defendant’s car was parked in a recreational facility inside the perimeter fence of the Atomic Weapons Establishment at Aldermaston, an area not open to the public, and he asked a police constable manning a gate if he could collect it. When the constable drove the defendant to collect the car he smelt alcohol on the defendant’s breath and, when the defendant subsequently approached the gate, which led onto the A340, driving his car, the constable signalled him to stop. The defendant provided a positive breath test, was arrested and after caution said that he needed to drive his friend home. A breath specimen provided at the police station contained alcohol in excess of the prescribed limit.”

30. The defendant was charged with the offence of attempting to drive a motor vehicle on a public road, namely the A340, having consumed alcohol in excess of the prescribed limit and convicted. The court concluded that there was no reason in law or logic why the defendant could not have been attempting to drive on a road simply by virtue of his having been driving within an area which was not open to the public, that the achievement of motion was not the critical distinction between driving and attempting to drive, and, therefore, the fact that the defendant’s car was in motion did not preclude a finding that he was attempting to drive on a public road.

31. Owen J in giving the lead judgment observed:

“23. Under the Criminal Attempts Act 1981 acts that are “merely preparatory” are excluded from the ambit of an attempt to commit an offence. But all acts short of those necessary for the commission of the intended substantive offence are in some sense preparatory. The introduction of the qualifying adverb “merely” in the Criminal Attempts Act must have been intended by Parliament to distinguish acts which, although preparatory, are sufficiently close to the final act or acts to be properly regarded as part of the execution of the defendant’s criminal course of conduct, from those which are not. All will turn on the facts of the case.”

32. Toulson LJ, in the course of his concurring judgment, spoke approvingly of a passage from the Law Commission’s Consultation Paper on Conspiracy Attempts LCCP No.183, taken from the first and last sentences of para.14.5:

“27 [...] To elaborate further, preparatory conduct by D which is sufficiently close to the final act to be properly regarded as part of the execution of D’s plan can be an attempt ... In other words, it covers the steps immediately preceding the final act necessary to effect D’s plan and bring about the commission of the intended offence.”

33. It is to be recognised, therefore, that there is a necessary distinction to be drawn between someone placing himself in a position to commit an offence (*viz.* mere preparatory acts), on the one hand, and attempting to commit the offence, on the other. As Nicol J recognised in *Mason v Director of Public Prosecutions* [2009] EWHC 2198 (Admin); [2010] RTR 11, “*the line is fine*” but the court must avoid conflating an admitted *mens rea* with the decision as to whether a “*sufficient actus reus*” has been established (see

[17] and [20]).

34. It is important in our judgment not to lose sight of the considerable differences that exist between the various offences which may be attempted (essentially the entire criminal calendar, with some clear exceptions such as attempting to commit the crime of conspiracy, (section 1(4)(a) Criminal Attempts Act 1981) and “compassing” the Monarch’s death), along with multiple different ways in which even similar or identical offences are attempted. The facts of the cases considered above serve to demonstrate the sheer variety of both circumstances and offending. This results in highly fact-specific decisions as to whether the steps taken by the accused were no more than merely preparatory. Mr Williams, in support of his submissions that there needed to be “*geographical proximity*”, raised the analogy of the offence of attempted murder, and suggested that it would be inconceivable that an individual could properly be said to have attempted murder at a distance of 85 miles from the intended victim. Depending always on the facts, the proximity of the accused to an intended murder victim may be critical in determining whether the steps taken by the accused were more than preparatory. In many cases when a sole offender contemplates murder (or an assault) by way of a direct physical attack, an attempt to commit the crime will only occur when the perpetrator and victim are in close proximity, when the action necessary (the *actus reus*) for attempting to kill or harm takes place (although we stress there will be undoubted exceptions to this sweeping generalisation). Similarly, in an attempted armed robbery of the kind contemplated in *Campbell*, proximity to the target premises, along with an evinced intention to enter, may be critical. Distance, or rather proximity, therefore, may be an important factor for attempted crimes of that kind. But no single factor, including proximity, constitutes a uniform test that applies to all species of offences. Child abduction by a person connected with the child is an entirely different offence to murder, assault and robbery. The action necessary for an attempted parental abduction, as in the instant case, may have been “*embarked upon*” at a considerable distance from the port or airport. For child abduction, geographical proximity does not have the same relevance as with other alleged crimes. Whether, *prima facie*, steps had been taken as part of the execution of the plan which were sufficiently close to the final act will always depend, therefore, on the ingredients of the offence and the facts of the case.
35. In the present trial, there was evidence that the respondent had left Stoke with the intention of leaving the country with her family and new boyfriend. She had the five relevant passports and the one-way tickets for the trip from Dover to Calais in her possession. She had booked accommodation for the journey through France en route to the port in Italy. The family had packed their bags, loaded the car and had left their home. The respondent had expressed her clear intention to leave the country and she had forged the necessary permission document for this purpose. The car in which they were travelling was headed towards Dover (albeit they had 85 miles yet to travel), the time of the sailing had been changed at the last moment, and the respondent had checked the ferry times during the journey.
36. We are entirely confident that these various steps, viewed together, were, to borrow the language of the Consultation Paper ([32] above), part of the execution of respondent’s plan to abduct SS. They were steps immediately preceding the final act that were necessary to complete her plan and to bring about the commission of the intended offence (*viz.* by travelling on the ferry to France). Put otherwise, when arrested, she was in the position of attempting to commit the offence in question, rather than simply getting ready or putting herself in a position to do so, and we have no doubt she had embarked “*upon on the crime proper*”. The distance they had yet to travel to Dover on the

motorway, which was a critical factor for the judge, was essentially unimportant given the multiple steps that, by the time they were intercepted, had been taken and the overall stage in the venture that had been reached. It was open to the jury, in our judgment, to conclude that the respondent was attempting to abduct SS.

37. We grant the application. We reverse the ruling of the judge which we consider to have been wrong in law. We order the resumption of the proceedings in the Crown Court by way of a new trial in front of a different judge.